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No. 76-1099

In the Supreme Court of the United States

OCTOBER TERM, 1976

LORENZA SHORT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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Petitioner seeks to set aside his conviction for income tax evasion on the ground that the trial court's admission of the testimony of a particular witness violated his Sixth Amendment right to confront the witnesses against him.

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of attempted tax evasion for the years 1967 through 1970, in violation of 26 U.S.C. 7201 (Tr. 967-968).[1] He was sentenced to four concurrent 18-month prison terms and fined a total of $10,000 (R. 13-14).[2]

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[1] "Tr." refers to the trial transcript.

[2] "R." refers to the separately bound record appendix filed in the court of appeals.

The court of appeals affirmed by order (Pet. App. 1a-2a).

By means of the net worth and nondeductible expenditures method of proof, the government established that the joint tax returns of petitioner and his wife understated the taxable income and the tax due and owing for each of the four prosecution years. The government conceded that petitioner had not signed the tax returns for the years at issue (Tr. 473-476), but contended that petitioner's wife was acting as his agent when she caused the returns to be prepared, signed his name to the returns, and mailed the returns or caused them to be mailed.

Marie Evans testified on behalf of the government that she prepared the joint income tax returns for the years at issue (Tr. 522). She stated that she dealt only with Mrs. Short (Tr. 541) and that when she asked Mrs. Short each year how much gambling income to report, Mrs. Short would sometimes ask "What did we do last year?" and then state that she was "going to check with Mr. Short" (Tr. 535). Evans testified that Mrs. Short thereafter advised her by telephone as to the amount of gambling income to report (Tr. 535).

Petitioner testified that he made his living gambling (Tr. 780), and spent about eight months a year in Florida, while his wife lived in Saginaw, Michigan. He said that he relied upon his wife to file their joint income tax returns (Tr. 796), and that while his wife was aware that he had gambling income, she had specific knowledge of only "some of my winnings" (Tr. 809). He further testified that he never furnished any figures for his gambling income to his wife for use on their joint income tax returns (Tr. 809), and that he assumed that his wife determined the amount to report on their

returns by making a guess based on "[h]ow much she seen [*sic*]" (Tr. 810). Petitioner's wife, who was granted a severance during the trial[3] (Supp. Tr. 22),[4] was called as a defense witness, but invoked her Fifth Amendment privilege and refused to testify (Tr. 860-861).

Petitioner argues (Pet. 4-5, 11) that Marie Evans' testimony was the only evidence connecting him to the false tax returns and that the district court's admission of her testimony violated his Sixth Amendment right of confrontation. But Evans' testimony was not the only evidence inculpating petitioner. As the court of appeals correctly observed (Pet. App. 2a), petitioner's admission that he relied upon his wife to file income tax returns that he knew did not include the full amount of his gambling income was sufficient to enable the jury to conclude that petitioner's wife acted as his agent in the filing of the false tax returns.[5]

At all events, the admission of Evans' testimony about her dealings with Mrs. Short did not violate petitioner's Sixth Amendment right to confront the witnesses because Evans was subject to cross-examination. The fact that Mrs. Short claimed her Fifth Amendment privilege and

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[3]Subsequently, Mamie Short withdrew her plea of not guilty and entered a plea of guilty to one count of the indictment. Following the imposition of sentence, the remaining counts of the indictment were dismissed (R. 13-14).

[4]"Supp. Tr." refers to the transcript of proceedings held on August 25, 1975.

[5]Petitioner did not move for a judgment of acquittal at the close of the government's case-in-chief (Tr. 689-692) or at the close of all the evidence (Tr. 862-866).

was not available for cross-examination did not bar admission of Evans' testimony concerning her conversations with Mrs. Short on Sixth Amendment grounds. The evidence of Mrs. Short's statement was not hearsay because it was offered not to prove the truth of that statement but simply to show that it had been made. See Rule 801(c), Federal Rules of Evidence. The statement was offered as a "verbal act" (see Advisory Committee's Note, Rule 801, Federal Rules of Evidence), and the jury was asked to infer from the facts that the statement was made, and that Mrs. Short subsequently telephoned Marie Evans and gave her the gambling income figure, that petitioner had supplied the figures used on the tax returns. See 6 Wigmore, *Evidence*, §1788, p. 313 (Chadbourn rev. 1976). Accordingly, the trial court properly admitted Evans' testimony of her conversations with Mrs. Short. See *Dutton* v. *Evans*, 400 U.S. 74, 88.

For the reasons stated, the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.**

APRIL 1977.

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*The Solicitor General is disqualified in this case.